IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-756

STATE OF OHIO, *Petitioner*

v.

HERSCHEL ROBERTS, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND

BRIEF FOR OHIO PUBLIC DEFENDERS ASSOCIATION AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Ohio Public Defenders Association hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of the respondent, as provided in Rule 42 of the Rules of this Court. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The Ohio Public Defenders Association, a non-profit organization incorporated under the laws of Ohio in 1973, has as its basic purpose the improvement of indigent criminal defense in Ohio. Our membership of two hundred and twenty-four represents all facets of criminal defense work, and includes county public defenders, private counsel, law school faculty and law students. The members of the Association represent clients involved in an estimated fifty-five percent of all misdemeanor and sixty-five percent of all felony cases arising annually in Ohio. With a membership comprising such a substantial percentage of the Ohio criminal bar, the Association is concerned with the case at bar and all other cases relating to criminal procedure which affect the rights of criminal defendants.

The Association's *Amicus* Committee has filed briefs in both the Ohio Supreme Court and the United States District Court, Northern District of Ohio, in other actions which involved the rights of criminal defendants. The instant case is of interest to the Association and its members since it originally arose in Ohio and directly concerns

an Ohio statute, Section 2945.49 of the Ohio Revised Code, which authorizes the use at trial of the prior recorded testimony of an unavailable witness. The Association has already expressed an interest in the interpretation and application of this particular statute as is evidenced by our entry as an *amicus curiae* in the case of *State of Ohio v. Ricardo Smith*, 58 Ohio St. 2d 344, ____ N.E. 2d ____ (1979). In that case, the Ohio Supreme Court limited the use of recorded preliminary hearing testimony of a witness unavailable at trial to cases where the defendant's cross-examination of the witness at the preliminary hearing was more than brief and ineffective.

Counsel for the respondent has dealt and will deal with the question of whether the mere opportunity for cross-examination of a witness at a preliminary hearing is sufficient to satisfy the Confrontation Clause of the Sixth Amendment to the United States Constitution, when the recorded preliminary hearing testimony is sought to be read into evidence, in the absence of the witness, at a criminal trial. Although the Association is concerned with the outcome of this question, we feel that this case presents an opportunity for the Court to address a more compelling concern regarding the use of recorded preliminary hearing testimony of an absent witness, the resolution of which may have a great impact upon the practice of criminal defense in Ohio and throughout the nation. That concern is the constitutionality, under the Confrontation Clause of the Sixth Amendment, of the use at trial of the recorded testimony of a witness, taken at either a preliminary examination or a preliminary hearing, regardless of the scope of cross-examination at the earlier hearing, when the

witness is, for any reason, unable to appear and testify at the subsequent trial.

Section 2945.49 of the Ohio Revised Code authorizes the use of testimony "taken at an examination or a preliminary hearing at which the defendant is present," along with testimony taken at a former trial of the same case or at a deposition arranged by either party, at a later trial of the defendant, whenever the witness has died, become incapacitated, or is otherwise unavailable. This statutory provision was relied upon in this case to secure the admittance of the recorded preliminary hearing testimony at issue. In *Barber v. Page*, 390 U.S. 719, 725 (1968), this Court stated that: "[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." The Association feels that based upon the significant differences between preliminary hearings and trials and depositions, which directly affect the scope and effectiveness of cross-examination, the inclusion of preliminary examination and preliminary hearing testimony within the purview of Section 2945.49 is violative of the Confrontation Clause of the Sixth Amendment. See *California v. Green*, 399 U.S. 149 (1970) (Brennan, J., dissenting). A decision of this Court which has as its basis the conclusion that there is a constitutional distinction between the *opportunity* for cross-examination and *actual* cross-examination, in determining the admissibility at trial of recorded preliminary hearing testimony of an absent witness, will not go far enough to resolve all of the constitutional infirmities of Section 2945.49. We believe that our contribution should assist the Court in

viewing the question here presented in a broader context, thus ensuring a clearer understanding of the profound impacts its decision may have upon criminal defense in Ohio and throughout the country.

For the foregoing reasons, the Ohio Public Defenders Association respectfully requests that this motion be granted.

Respectfully submitted,

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BRIEF OF
OHIO PUBLIC DEFENDERS ASSOCIATION
AS *AMICUS CURIAE*

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Section 2945.49 of the Ohio Revised Code (Page, 1974):

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

CITATIONS OF AUTHORITY

QUESTION PRESENTED

Whether Section 2945.49 of the Ohio Revised Code, specifically the language which permits the recorded preliminary examination or preliminary hearing testimony of an unavailable witness to be admitted into evidence at the trial of a criminal defendant, is unconstitutional as violative of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

INTEREST OF *AMICUS CURIAE*

The Interest of Ohio Public Defenders Association as *amicus curiae* is set forth in the Association's motion for leave to file this brief *amicus*, to which motion this brief is annexed.

SUMMARY OF ARGUMENT

I

A. The Bill of Rights of the United States Constitution sets forth guarantees made to every citizen for protection from the sovereign government. The most difficult of these guarantees to protect have been those which are asserted by citizens charged with or convicted of crimes. The right of confrontation in all criminal prosecutions, guaranteed by the Sixth Amendment, is one of these rights.

B. This Court has recognized several exceptions to the Sixth Amendment's confrontation guaranty. Notably, the admissibility of dying declarations has been upheld by this Court, and the use of recorded trial testimony of a now-deceased witness at an accused's second trial has also been approved. These exceptions have been grounded in public policy or in the necessities of the cause at issue.

C. The constitutionality of the admission at an accused's trial of an absent witness' recorded preliminary hearing testimony has not been decided by this Court. The prior case law supports the proposition that the Confrontation Clause may be satisfied when the witness is shown by the State to be unavailable to testify at trial and the witness was cross-examined by defense counsel at the preliminary hearing. This Court has not, however, relied upon this proposition in a case like the one at bar: where the witness, whose preliminary hearing testimony was admitted at the respondent's trial, was *actually* absent at trial.

D. Section 2945.49 of the Ohio Revised Code should be interpreted to exclude any use of preliminary hearing testimony as a substitute for live witness testimony at a criminal trial. A decision by this Court, which upholds the validity of this language of Section 2945.49, will likely require defendants to choose between their right to confrontation and their right to a preliminary hearing. If defendants waive their preliminary hearing rights in Ohio, they will lose their right to have a probable cause determination of their guilt or innocence. If defendants do not waive their rights to a preliminary hearing, then these hearings will become mini-trials, as cross-examination becomes more searching and extensive. Such an exception to the Confrontation Clause would allow the State to obtain convictions at the expense of the accused's basic trial rights while adding additional burdens to our court system. The balance here should be struck in favor of the accused.

II

A. The Sixth Amendment to the United States Constitution guarantees that a criminal accused shall have the right to confront the witnesses against him. The object of the Confrontation Clause has been viewed by this Court as the prevention of the use of *ex parte* affidavits and depositions at the trial of an accused, in lieu of an actual examination of the witness by the accused, thus ensuring that the defendant will have

examined the witness face-to-face and that the trier of fact will have the opportunity to view the witness' demeanor. This Court has, however, created some exceptions to the literal reading of the Confrontation Clause. The purported exception at issue in this case is the admissibility at trial of an absent witness' recorded preliminary hearing testimony. Generally, this Court has appeared to uphold the use at trial of such recorded testimony, as long as it was established that the witness was truly unavailable to testify at trial and that the defendant had the *opportunity* to cross-examine the witness at the preliminary hearing. This Court, however, has not declared, in its prior holdings, that the *opportunity* for the accused to cross-examine the witness meant anything less than *actual* cross-examination. The mere opportunity for cross-examination therefore does not satisfy the requirements of the Confrontation Clause.

B. In the present case, the witness, Anita Isaacs, was not cross-examined by the respondent's counsel at the preliminary hearing, as was recognized by the Supreme Court of Ohio. Ms. Isaacs was called on direct examination by the respondent's counsel and was at no time declared by the court to be a hostile witness. Although "leading" questions were asked of the witness by the respondent's counsel, no objections were made by the petitioner, and the petitioner did not cross-examine Ms. Isaacs. The form and substance of the counsel for the respondent's examination of Ms. Isaacs was that of direct examination.

The absent witness' recorded preliminary hearing testimony was admitted into evidence at the respondent's trial pursuant to Section 2945.49 of the Ohio Revised Code. The Supreme Court of Ohio held that, notwithstanding Section 2945.49, the Confrontation Clause was violated when the recorded preliminary hearing testimony was admitted, because it was shown that the witness had not been cross-examined by the respondent's counsel at the preliminary hearing. This Court should not disturb the ruling of the Supreme Court of Ohio, which correctly interpreted the facts and properly applied the prevailing case law.

ARGUMENT

Proposition of Law One:

OHIO REVISED CODE §2945.49, TO THE EXTENT THAT IT PURPORTS TO PERMIT THE USE OF PRELIMINARY HEARING TESTIMONY OF AN ABSENT WITNESS AT A CRIMINAL TRIAL, VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND SHOULD BE DECLARED INVALID. TO THE EXTENT THAT IT PURPORTS TO PERMIT THE USE AT TRIAL OF ANY PRIOR TESTIMONY OTHER THAN WHERE THE WITNESS IS DEAD, INSANE, OR DISABLED, OR WHERE THE DEFENDANT HAS PROCURED THE WITNESS ABSENCE, OHIO REVISED CODE §2945.49 IS ALSO INVALID.

A. The Right to Confrontation

The Bill of Rights was appended to the United States Constitution in 1791, to set forth explicitly the guarantees made to every citizen for protection from the sovereign, in this case, the United States Government. Characteristic of the suspicion of government which permeates the basic document, as embodied in the elaborate system of checks and balances contained therein, are the prohibitions and entitlements set forth in the first eight amendments. The proponents of the amendments knew that the United States Government, although a government of laws, would be administered by imperfect men and women. Therefore, it was insufficient to leave to common understanding the various freedoms and rights which had been wrested at great cost from despots, ancient and modern. They determined to commit their common understanding to writing, so that those who followed could be constantly reminded of the necessity for citizens to remain ever watchful lest their hard-won rights and freedoms be eroded.

The most difficult of these rights for citizens to protect and defend have been the rights which, because of their very nature,

are most frequently asserted by those charged with or convicted of crimes, and rarely needed by a majority of the citizenry. Those who have done no wrong need not fear searches of their persons, houses, papers, and effects, since the fruits of such searches would not incriminate them. Innocent citizens need never exercise their rights to silence since, having done no wrong, they have nothing to hide from the authorities. Perhaps most difficult of all for the citizen who expects never to have to undergo a criminal trial, is the protection and defense of the trial rights guaranteed by the Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[1]

The language of the Sixth Amendment is plain and straight forward, and at this late date, almost all of its provisions are given full effect throughout the United States. In many jurisdictions, speedy trials are statutorily ensured by providing for dismissal of charges if the defendant is not brought to trial within a specified period of time. While the size of juries required by the Sixth Amendment has not been finally determined, the right to a jury trial in serious criminal cases has been firmly established. Compulsory process, within reason, is available to all criminal defendants. And the right to counsel, as this Court well knows, has been extended to practically every stage of criminal proceedings.

The right to confrontation, however, has not fared so well, for a variety of reasons. The right of confrontation is analogous to the evidentiary rule prohibiting hearsay. Designed to ensure,

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[1] United States Constitution, Amend. VI.

under an adversary system, the reliability of testimonial evidence by subjecting such evidence to cross-examination before the trier of fact, the hearsay rule has become, through the years, riddled with exceptions. Of course, the exceptions are usually grounded in public policy, and the reliability of the out-of-court statements is said to be guaranteed by various factors. So it has been with the Sixth Amendment's confrontation clause.

B. The Exceptions

The necessity for the use of dying declarations in criminal trials was examined by this Court in the case of *Clyde Mattox v. United States*.[2] Even though the particular question was whether the *defendant* was entitled to elicit testimony with respect to dying declarations on his behalf, and, consequently, no Sixth Amendment objection was raised in the case, the Court's discussion makes clear its willingness to except such statements from the hearsay prohibition, and by inference, from the Sixth Amendment's confrontation guarantee. This is so in spite of recognition by the Court that such statements, by their very nature, are made out of court, are not under oath, and are not subject to cross-examination.

After the reversal of conviction in *Clyde Mattox*, the defendant suffered a second conviction. At his second trial, the transcribed testimony of two of the government's witnesses at the first trial was allowed into evidence against him, since both witnesses had died between the two trials. The case was again pursued to this Court which, in *Mattox v. United States*,[3] had occasion to directly examine the question of whether such a procedure is violative of the Sixth Amendment confrontation right.

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[2] 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892).

[3] 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895).

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of the personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however, beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.[4]

As in the *Clyde Mattox* case, the death of a witness gives rise to a special set of circumstances whereby introduction of out-of-court statements, while clearly violative of the confrontation right, is nevertheless upheld on policy grounds based on other indicia of reliability and balancing of the interests of the accused with those of society.

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[4] 156 U.S. at 242-243.

C. The Use of Preliminary Hearing Testimony

To the extent that preliminary hearing testimony is now permitted to be introduced at trial in the absence of the witness, this "exception" to the confrontation clause has grown over the years, not as a result of affirmative decision and rational choice by this or any other court, but almost as a matter of unstated assumption. One of the earliest cases in which this Court addressed itself to the question is that of *Motes v. United States*.[5] Mr. Justice Harlan, for a unanimous Court, cites at length from *Regina v. Scaife*[6] for the apparent proposition that only three circumstances would justify the use at trial of the deposition, taken before magistrates, of the absent witness: 1) the witness has died, 2) the absence of the witness was procured by the accused, and 3) the witness is so ill as to be unable to travel. In *Motes*, since there was absolutely no showing that the absence of the witness had been procured by the accused, and since the witness had been seen in the court house within an hour of the commencement of trial, use of the transcript of his testimony given at the preliminary trial of the case was held to be barred by the Confrontation Clause. The fact that the defendants had the opportunity to, and did, in fact, cross-examine the witness at the preliminary trial, played no part in the Court's decision.

The limited exceptions to the Confrontation Clause, referred to in this Court's opinion in the *Motes*[7] case, were pointedly not at issue when the Court decided the case of *West v. Louisiana*[8]. In the words of Mr. Justic Peckham,

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[5] 178 U.S. 458, 20 S. Ct. 993, 44 L. Ed. 1150 (1900).

[6] 2 Den. Cr. C. 281, 285-286, S.C. 17 Q.B. 238, 5 Cox Cr. C. 243 (1851).

[7] *Supra*, Note 5.

[8] 194 U.S. 258, 24 S. Ct. 650, 48 L. Ed. 965 (1904).

> As the Sixth Amendment does not apply to the state courts, the question as to what is required under its provisions in order to preserve the right to be confronted with the witness is eliminated from any inquiry by this court in this case.[9]

Because the question of the admissibility of the absent witness' preliminary hearing testimony had been decided by the Louisiana Supreme Court, interpreting its own constitution and statutes, this Court concluded that the state of the law in Louisiana on this issue did not present a federal question. Its inquiry was limited to determining whether the practice complained of violated the defendants' due process rights under the Fourteenth Amendment. Since the Sixth Amendment had not been made applicable to the states, the Court concluded that no federal right of the defendants had been violated and that they had been accorded due process of law.

Even though he specifically excluded consideration of the proper application of the Sixth Amendment Confrontation Clause from the decision in the case, Mr. Justice Peckham was at some pains to open the door to consideration of the broadening of exceptions to the confrontation right, should the proper case arise in a federal prosecution in the future. *West* involved a non-resident witness who was permanently absent from the state, and whom the prosecution was unable to produce. After listing the undisputed grounds for allowing introduction of prior recorded testimony at trial in the absence of the witness (death, insanity, disabling illness, connivance of defendant), Mr. Justice Peckham suggested, in response to the defendants' claim that the circumstances in the case would not have constituted an exception to the confrontation right at common law, that there is a split in authority on this question.[10] After citing several previous decisions of this Court, none of which went so far as to permit the former testimony of witnesses who were

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[9] *Id.* at 264.

[10] *Id.* at 262.

merely unavailable at trial, he somewhat gratuitously concludes that "in not one of these cases was it held that, under facts such as were proved in this case, there would have been a violation of the Constitution in admitting the deposition in evidence."[11]

To the extent that it held that the Sixth Amendment did not apply in state court prosecutions, *West* was overruled by this Court's decision in the case of *Pointer v. Texas*.[12] But apart from the declaration that confrontation and the right to cross-examination are fundamental rights applicable to the states through the Fourteenth Amendment,[13] *Pointer* is, in essence, a right to counsel case, following hard on the heels of *Gideon v. Wainwright*[14] and *Malloy v. Hogan*[15]. Mr. Justice Black framed the question for the Court's decision as follows:

> . . . petitioner's objection is based not so much on the fact that he had no lawyer when Phillips made his statement at the preliminary hearing, as on the fact that use of the transcript of that statement at the trial denied petitioner any opportunity to have the benefit of *counsel's cross-examination* of the principle witness against him.[16] (emphasis added)

His conclusion answers the question in the same right-to-counsel terms:

> Because the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner *through counsel* an adequate opportunity to cross-examine Phillips. . . . use of the transcript to convict petitioner denied him a constitutional right. . . .[17] (emphasis added)

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[11] *Id.* at 265-266.

[12] 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[13] *Id.* at 403.

[14] 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[15] 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 633 (1964).

[16] 380 U.S. at 403.

[17] *Id.* at 407-408.

In *Pointer*, Phillips, the absent witness, had moved from Texas to California some time before the trial, and did not intend to return. Without ever deciding the issue, in this or any previous case, the Court seems to assume that this "unavailability" of the witness would justify the use at trial of the witness' preliminary hearing testimony, if cross-examination through counsel had been available at that hearing. Indeed, Mr. Justice Black goes so far as to state at one point, that:

> The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine,[18]

thus nudging a little wider the door opened by Mr. Justice Peckham in the *West*[19] case.

The practice of assuming, without deciding, the existence of a "mere unavailability" exception to the Confrontation Clause was continued, although in a somewhat muted fashion, in this Court's decision in *Barber v. Page*.[20] The principal evidence against the defendant at his trial was the preliminary hearing transcript of a co-defendant's testimony. The co-defendant was incarcerated in another state at the time of trial, and the prosecution made no affirmative effort to secure his presence to testify. The holding of the case is that: "a witness is not 'unavailable' for purposes of the ['mere unavailability'] exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[21] But Mr. Justice Marshall's treatment of the "mere unavailability" exception is very interesting. After first hearkening back to *Mattox*[22] for the proposition that confrontation

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[18] *Id.* at 407.

[19] *Supra*, Note 8.

[20] 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

[21] 390 U.S. at 724-725.

[22] *Supra*, Note 3.

guarantees both the opportunity of "testing the recollection and sifting the conscience of the witness,"[23] and *Pointer*[24] for the proposition that "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal,"[25] he presents a short discussion concerning exceptions to the confrontation right. The only example cited of such as exception is *Mattox* (the witness died between first and second trials; testimony was given at trial rather than preliminary hearing). The term "substantial compliance" makes its first appearance in this Court's decision, being drawn from treatises on the law of evidence[26]. The Court acknowledges that the same treatises "have heretofore assumed that the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation. . ."[27] But the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, along with the availability of writ of habeas corpus *ad testificandum*, have "largely deprived [the 'mere unavailability' exception] of any continuing validity in the criminal law."[28] But after seeming thus to have begun closing the door first opened in *West*,[29] Mr. Justice Marshall, in the penultimate paragraph of the opinion, again invites further use and application of this exception which has been largely deprived of validity:

[23] 390 U.S. at 721, quoting *Mattox v. United States, supra*, 156 U.S. at 242-243.

[24] *Supra*, Note 12.

[25] 390 U.S. at 721, quoting *Pointer v. Texas, supra*, 380 U.S. at 405.

[26] *See* 390 U.S. at 722.

[27] *Id.* at 723.

[28] *Id.*

[29] *Supra*, Note 8.

> While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.[30]

Once again, the Court suggested, but did not decide, that use of preliminary hearing transcripts at trial, in place of an absent witness, satisfies the confrontation requirement of the Sixth Amendment.

The Court's opinion in the case of *California v. Green*[31] amply displays the danger involved in a century-long unstated process of expansion of the confrontation exception. Since the case involved introduction of prior testimony and statements of a witness who was, in fact, present at trial, there was no necessity to address the question which the Court must decide in this case: whether preliminary hearing testimony may be introduced at trial where the witness is absent. Nevertheless, Mr. Justice White took the opportunity to examine the state of the law on this issue by way of comparison with the situation which was, in fact, presented by the case. Mr. Justice White reasoned that since the Court would probably find the preliminary hearing testimony admissible if the witness was absent, it surely could do no less when the witness was present. The Court cites *Mattox*[32] for the proposition that it "long ago held that admitting prior testimony of an unavailable witness does not violate the Confrontation Clause."[33] Of course *Mattox* involved a dead witness, whose prior testimony was given at a previous trial of the same case as opposed to the preliminary

[30] 390 U.S. at 725-726.

[31] 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

[32] *Supra*, Note 3.

[33] 399 U.S. at 165.

hearing testimony of a witness who is merely unavailable. The Court saw no significant difference between the preliminary hearing and the trial in *Green*. This conclusion is buttressed by the door-opening *dictum* from *Pointer*,[34] cited above, to the effect that different facts would make a different case. Overlooked is the fact that, in addition to being *dictum*, the quoted portion of *Pointer* has at least as much to do with the right to counsel as with the right to confrontation. Finally, ignoring the criticism of the "mere unavailability" exception found in *Barber v. Page*,[35] Mr. Justice Stewart goes directly to the door-opening paragraph quoted above to support the contention that use at trial of preliminary hearing testimony of an absent witness satisfies the demands of the confrontation clause.

D. The Use of Preliminary Hearing Testimony Under Section 2945.49 of the Ohio Revised Code.

At common law, and in the early confrontation cases decided by this Court, there appear to have been several common exceptions to the confrontation requirement. When a witness was dead, insane, or too sick to attend the trial, prior testimony or a dying declaration could be introduced against the defendant at trial. Also, if the accused was responsible for the failure of the witness to appear, he could hardly be heard to complain about the violation of his right to confrontation. It was never argued on behalf of these exceptions that they satisfied the confrontation requirement; rather, they were rooted in public policy and a balancing of the trial rights of defendants with the interests of the public in the administration of justice. It is only as the Court, by implication, has considered further exceptions to the confrontation requirement that it has become necessary to speak in terms of "substantial compliance" and "indicia of reliability".

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[34] *Supra*, Note 12.

[35] *Supra*, Note 20.

The proposed exception now before this Court with respect to the use of preliminary hearing testimony fits into this category of exceptions. It cannot be argued for on the basis of public policy, for what public policy is advanced by eroding the very basis of the adversary system, the right of accused persons to confront the witnesses against them? Several of the cases have spoken of confrontation as a trial right,[36] implying or stating that, in addition to providing the opportunity for cross-examining the witness, the Confrontation Clause also contemplates observation of the demeanor of the witness by the trier of fact, for the purposes of assessing the credibility of the witness. The opportunity for this assessment is lost in any case where the witness' testimony is presented by reading a transcript in the absence of the witness.

In Ohio, a defendant has a right to a preliminary hearing, to establish probable cause to hold him to answer a felony charge.[37] He may choose to waive this right for various tactical reasons. A decision by this Court that preliminary hearing testimony may be used against an accused at trial, in the absence of the witness, will likely force each defendant to balance his right to a preliminary hearing against the right of confrontation at trial. By waiving his right to a preliminary hearing, the accused will ensure that there will be no recorded hearing testimony to be used against him at trial, in the event a witness does not appear. However, the accused will then lose his right to have the State establish that there is sufficient evidence to warrant his case being bound-over to the common pleas court. He will give up an opportunity, before trial, to learn the identity of the witnesses against him and the nature of their testimony. Preliminary hearings are also discovery devices for both the defense and the prosecution.

By not waiving his right to a preliminary hearing, the defendant will necessarily be put to the task of cross-examining,

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[36] *E.g. Barber v. Page, supra.*

[37] *See* Rule 5(B)(1) of the Ohio Rules of Criminal Procedure.

to the fullest extent possible, each witness that testifies against him, to guard against the possible absence of a witness at trial. The apprehension that a witness' recorded testimony at the hearing may be admitted into evidence at trial will undoubtedly cause the defendant to approach the hearing as a mini-trial and cross-examine each witness extensively. In Ohio, a preliminary hearing must be held within five days of an arrest or service of summons, if the defendant is in custody, and within fifteen days of the same, if the defendant is not in custody.[38] Because there is generally little time for counsel to prepare for a preliminary hearing, the need for the proper preparation of extensive, searching cross-examination will prompt defense counsel to seek continuances of the preliminary hearing. More requests for continuances and longer preliminary hearings will result in placing heavier burdens upon the dockets of our already overworked municipal courts.

As concerned as society is with the apprehension and conviction of wrongdoers, the Court should resist the temptation to make the task of the state in securing convictions easier either at the expense of basic trial rights or at the expense of our over-burdened court system. The statute must be interpreted to exclude any use of preliminary hearing testimony as a substitute for live witness testimony at a criminal trial. To hold otherwise would be to undermine hundreds of years of common law tradition, and the intentions of the authors of the Bill of Rights and inevitably to force criminal defendants in Ohio to choose between their right to a preliminary hearing and their right of confrontation.

Proposition of Law Two:

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS VIOLATED WHEN THE RECORDED HEARING TESTIMONY OF AN UNAVAILABLE WITNESS, NOT SUBJECT TO ACTUAL CROSS-EXAMINATION AT THE PRELIMINARY HEARING, IS ADMITTED INTO EVIDENCE AT AN ACCUSED'S TRIAL.

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[38] *Id.*

A. The case law supports the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing does not satisfy the Confrontation Clause.

The Sixth Amendment to the United States Constitution states in part that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ." This guaranty of the Sixth Amendment, referred to as the Confrontation Clause, was held to be applicable to the states, by virtue of the Fourteenth Amendment, in *Pointer v. Texas*.[39] In *Pointer, supra*, this Court declared that: "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[40]

In 1895, this Court, in *Mattox v. United States*,[41] discussed the nature and purpose of the Confrontation Clause, concluding that:

> "[t]he primary object of the [Confrontation Clause of the Sixth Amendment] was to prevent depositions or *ex parte* affidavits. . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[42]

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[39] *Supra*, Note 12.

[40] 380 U.S. at 405.

[41] *Supra*, Note 3.

[42] 156 U.S. at 242-243.

In a more recent decision, this Court reiterated the view expressed in *Mattox, supra*, regarding the purpose of the Confrontation Clause, by stating, in *Barber v. Page*,[43] that: "[t]he right of confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness."[44] These cases recognize that the Confrontation Clause, literally read, requires, at a minimum, the presence of adverse witnesses at the trial of the accused and the opportunity for the accused to examine the witnesses face-to-face, in the presence of the trial factfinder.

However, this Court and other courts have created exceptions to the literal reading of the Confrontation Clause, based upon considerations of public policy and necessity, in cases in which a witness is for some reason unavailable to testify at the trial of the accused. In *Clyde Mattox v. United States*,[45] this Court upheld, as a matter of necessity, the admissibility of dying declarations against an accused in a homicide case. In *Mattox v. United States*,[46] this Court held that the Confrontation Clause was not violated by the admission of a deceased witness' testimony, taken at a former trial, at the second trial of the criminal defendant. In so holding, the Court stated that: "[t]he substance of the constitutional protection [of the Confrontation Clause] is preserved to the prisoner in the advantage he has once had of seeing the witness face to face and of subjecting him to the ordeal of cross-examination."[47] Therefore, as long as the accused was able to cross-examine the witness at the previous trial, the Court decided that the Confrontation Clause was satisfied and that the prior testimony was admissible.

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[43] *Supra*, Note 20.

[44] 390 U.S. at 725. *See also Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

[45] *Supra*, Note 2.

[46] *Supra*, Note 3.

[47] 156 U.S. at 245.

Later, this Court was faced with the question of whether it made any difference under the Confrontation Clause that the prior testimony of an unavailable witness, sought to be admitted at the trial of an accused, was taken at a preliminary hearing instead of a former trial. In *Motes v. United States*,[48] this Court held that the defendants' rights of confrontation had been violated by the admission at their trial of a witness' recorded preliminary hearing testimony, when the witness' unavailability was due to the negligence of the accused.[49]

Four years later in 1904, however, in *West v. Louisiana*,[50] this Court concluded that the admission of a deposition of an unavailable witness' preliminary hearing testimony at the defendant's trial was not violative of the Due Process Clause of the Fourteenth Amendment. The thrust of the decision was that the Due Process Clause did not prohibit the State of Louisiana from extending the common law rule and permitting the use at trial of the prior recorded testimony of a witness, who was permanently absent from the jurisdiction once he had been confronted by the defendant.[51] The Court spoke in terms of the "opportunity" for cross-examination as being a sufficient predicate for the recorded testimony's admissibility at trial. The defendant in *West, supra*, however, had more than the "opportunity" to cross-examine the witness at the preliminary hearing: the defendant's counsel had *actually* cross-examined the witness at the prior hearing. Thus, after *West, supra*, it is reasonable to conclude that the requirements of the Confrontation Clause were deemed to be satisfied only when it was shown that the

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[48] *Supra*, Note 5.

[49] The facts in *Motes v. United States, supra*, revealed that the counsel for four of the defendants had actually cross-examined the witness at the preliminary hearing.

[50] *Supra*, Note 8.

[51] The Court in *West v. Louisiana, supra*, refused to consider the Sixth Amendment claim raised by the defendant-appellant, holding that the Sixth Amendment was not applicable to state proceedings. However, the Court, in *Pointer v. Texas, supra*, specifically overruled this interpretation of the Sixth Amendment.

witness, whose recorded preliminary hearing testimony was sought to be admitted at trial, was *in fact* cross-examined at the preliminary hearing and was unavailable to testify at trial for reasons other than the fault of the State.

In *Pointer v. Texas, supra*, decided by this Court in 1965, the defendant, although not represented by counsel, did have the "opportunity" to cross-examine the chief prosecution witness, the victim of a robbery allegedly committed by the defendant, at his preliminary hearing, but did not actually cross-examine the witness. He did, however, attempt to cross-examine some other witnesses at the hearing. This Court, after holding that the Confrontation Clause of the Sixth Amendment was applicable to the States, concluded that the defendant's right of confrontation had been violated. This Court stated that:

> This case before us would be quite a different one had [the witness'] statement been taken at a full-fledged hearing at which [the defendant] had been represented by counsel who had been given a complete and adequate opportunity to cross-examine. Compare *Motes v. United States* . . .[52]

This Court in *Pointer, supra*, thus spoke in terms of the "complete and adequate opportunity" for cross-examination by the defendant's counsel. The Court's language here could be interpreted as requiring only that the defendant have the assistance of counsel at the preliminary hearing and that the counsel have the opportunity, whether or not actually exercised, to cross-examine the witness. However, the Court cited to *Motes, supra*, as a case in comparison. In *Motes*, the defendants did have counsel at the preliminary hearing, at which time the attorney *actually* cross-examined the later-unavailable witness. Therefore, by virtue of the comparison to *Motes, supra*, and of the fact that Pointer was unrepresented by counsel and did not cross-examine the witness at all, this Court in *Pointer, supra*,

[52] 380 U.S. at 407.

arguably intended for the words, "complete and adequate opportunity to cross-examine," to encompass both the assistance of counsel and *actual* cross-examination of the witness at the preliminary hearing.

In 1968, this Court decided *Barber v. Page*.[53] In *Barber*, this Court found that the defendant's right of confrontation had been violated by the admission at his trial of the recorded preliminary hearing testimony of an absent witness, since the State had not made a good-faith effort to secure the presence of the witness at trial. This Court went on to state that:

> [m]oreover, we would reach the same result on the facts of this case had [Barber's] counsel actually cross-examined [the witness] at the preliminary hearing. See *Motes v. United States* . . .[54]

Clearly, this Court felt that it did not have to reach the issue of whether the mere opportunity for cross-examination or actual cross-examination was required under the Confrontation Clause, since the State had not properly established the unavailability of the witness. The Court, in dictum, does state, however, that:

> there may be some justification for holding that the *opportunity* for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable. . .[55]

Yet, this Court in *Barber, supra*, did not discuss what was encompassed by the term, "opportunity". There was actual cross-examination of the witness at the preliminary hearing by the defendants in the three cases cited by this Court in

[53] *Supra*, Note 20.

[54] 390 U.S. at 725.

[55] *Id.* at 725-726 (italics added).

Barber, supra, as being comparable in result to the decision reached in *Barber*.[56] *Barber* is, on the whole, not persuasive on the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing satisfies the Confrontation Clause.

Lastly, this Court, in *California v. Green*,[57] addressed once again the issue of whether the Confrontation Clause is violated by the admission into evidence at trial of an unavailable witness' recorded preliminary hearing testimony. In *Green, supra*, the witness was actually present at the defendant's trial, yet he was uncooperative on the stand and claimed he could not remember certain details concerning the alleged offense. The prosecution read parts of the witness' preliminary hearing testimony into evidence, for the truth of the matter therein, and the prior testimony also allegedly "refreshed" the recollection of the witness.[58] The California District Court of Appeals reversed the defendant's conviction, concluding that his right of confrontation had been violated, and the California Supreme Court affirmed.[59] This Court reversed, however, finding that the witness' preliminary hearing testimony "was admissible as far as the Constitution is concerned wholly apart from the question of whether [the defendant-respondent] had an effective opportunity for confrontation at the subsequent trial."[60]

This Court reasoned that if the witness had died or was otherwise unavailable at the trial, then "the right of confrontation [afforded at the preliminary hearing would have provided] . . .

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[56] The Court in *Barber v. Page, supra* cited to *Motes v. United States, supra, Holman v. Washington*, 364 F. 2d 618 (5th Cir. 1966), and *Government of the Virgin Islands v. Aquino*, 378 F. 2d 540 (3rd Cir. 1967).

[57] *Supra*, Note 31.

[58] Certain prior inconsistent statements allegedly made by the witness were also admitted as substantive evidence by the trial court.

[59] *People v. Green*, 70 Cal. 2d 654, 75 Cal. Rptr. 782, 451 P. 2d 422 (1969).

[60] 399 U.S. at 165.

substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's [unavailability was] in no way the fault of the State."[61] This Court refused to hold otherwise just because the witness actually appeared at the trial.

However, *Green, supra*, is not authority for the proposition that the mere opportunity for cross-examination of the witness at the preliminary hearing satisfies the Confrontation Clause. The defendant's counsel in *Green* extensively cross-examined the witness at the preliminary hearing. The Court recognized this fact, and noted that: "[defendant-respondent's] counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness Porter at the preliminary hearing."[62] This statement by this Court implies that if the defendant's counsel had been limited, to a significant extent, in the scope or nature of his cross-examination, this Court may have reached a different result. Therefore, although this Court, in *Green, supra*, allowed the admission at trial of the "unavailable" witness' recorded preliminary hearing testimony, *Green* nevertheless appears to require, for Confrontation Clause purposes, that the witness be *actually* cross-examined by the defendant's counsel at the preliminary hearing.

B. In the present case, the witness, whose preliminary hearing testimony was admitted in her absence at the respondent's trial, was not cross-examined by the respondent's counsel at the preliminary hearing.

The respondent was arrested on January 7, 1975, by the Mentor, Ohio, police and charged with forging a check, in the name of Bernard Isaacs, and with receiving stolen property, namely, certain credit cards belonging to Bernard Isaacs and Mrs. Isaacs. At his preliminary hearing on January 10, 1975,

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[61] *Id.* at 166.

[62] *Id.*

the respondent called, as a witness in his behalf, Bernard Isaacs' daughter, Anita Isaacs. She testified that she knew the respondent, who was the boyfriend of one of her friends, and that she had let her friend and the respondent use her apartment while she was on vacation. She also testified that she let the respondent use her apartment for a few days after she came back from vacation.

Ms. Isaacs then denied that she had given her parents' credit cards to the respondent or that she had talked to the respondent about letting him use the credit cards to purchase a television set. Although the respondent's counsel did ask the witness some questions at this point which could be characterized as "leading," since he was apparently surprised by her testimony, he did not ask that the witness be declared hostile by the court, and he did not ask to examine her as if on cross-examination.

The witness, Anita Isaacs, was not cross-examined by the respondent's counsel at the preliminary hearing. This fact was clearly recognized by the Ohio Supreme Court in this case.[63] The witness was called by the respondent's counsel and questioned on direct examination. It is true that some of the questions posed to the witness by the respondent's counsel were of a form generally associated with cross-examination. Yet, the respondent's counsel did not seek to have the witness declared hostile, as is his privilege in Ohio,[64] nor did he ask to examine the witness as on cross-examination.

The petitioner did not, at any time, object to the form or nature of any of the questions asked by the respondent's counsel. The petitioner had the opportunity to object to the questions as he saw fit at the hearing, but instead chose to waive any objections. The petitioner also chose not to cross-examine the witness. He should not be heard to complain at this point that

[63] The Ohio Supreme Court declared that: "[i]n the instant cause, of course, the witness was never cross-examined." *State v. Roberts*, 55 Ohio St. 2d 191, 199, 378 N.E. 2d 492 (1978).

[64] *See State v. Parrott*, 27 Ohio St. 2d 205, 272 N.E. 3d 112 (1971).

the questions asked of the witness by the respondent's counsel were somehow improper for or uncharacteristic of direct examination. It is not exalting form over substance to state that there was no cross-examination of the witness, Anita Isaacs, by the counsel for the respondent at the preliminary hearing. The form and substance of the respondent's questioning of the witness at the hearing was that of direct examination.

C. Because the respondent did not *in fact* cross-examine the witness, Anita Isaacs, at the preliminary hearing, the admission of the recorded preliminary hearing testimony of Ms. Isaacs, in her absence, at the respondent's trial violated the Confrontation Clause of the Sixth Amendment.

The recorded preliminary hearing testimony of Anita Isaacs, who was not located by the petitioner to testify at trial, was admitted into evidence over the respondent's objection, at the respondent's trial. This testimony was admitted by the trial court pursuant to Section 2945.49 of the Ohio Revised Code, which allows the use at trial of preliminary hearing testimony when the witness "cannot for any reason be produced at the trial." The respondent was subsequently found guilty of all counts against him by a jury, and the trial court entered judgment.

The Court of Appeals for Lake County, Ohio, reversed the respondent's convictions, finding that the admission of the prior recorded testimony violated the Confrontation Clause of the Sixth Amendment. The Court of Appeals based its decision on the failure of the State to show that it had made the requisite good-faith effort to secure the presence of the witness at the respondent's trial.

The Supreme Court of Ohio affirmed, not on the basis of the failure of the State to make a good-faith effort to procure the presence of the witness at trial,[65] but rather on the basis that:

[65] The Ohio Supreme Court, in *State v. Roberts, supra*, found that: "the trial judge could properly hold that the witness was unavailable to testify in person." 55 Ohio St. 2d at 195.

"the *mere opportunity* to cross-examine at the preliminary hearing cannot be said to afford confrontation for purposes of the trial."[66] The Ohio Supreme Court thus held that the Confrontation Clause precluded the use of a witness' recorded preliminary hearing testimony at a defendant's trial, notwithstanding Section 2945.49 of the Ohio Revised Code, where the witness was not cross-examined by the defendant at the preliminary hearing.

This Court should not disturb the findings of the Ohio Supreme Court in this case. The Ohio Supreme Court recognized that the respondent in this case did not in fact cross-examine the witness and, therefore, properly concluded, based upon the prior case law, that the mere opportunity for cross-examination does not satisfy the requirements of the Confrontation Clause of the Sixth Amendment.[67]

CONCLUSION

This Court should hold that Section 2945.49 of the Ohio Revised Code, to the extent that it permits the admission into evidence at a defendant's trial the recorded preliminary examination or preliminary hearing testimony of an unavailable witness, is unconstitutional, as violative of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Should this Court decide that Section 2945.49 of the Ohio Revised Code is not unconstitutional on its face, as it pertains to the admissibility of recorded preliminary hearing testimony at a defendant's trial, this Court should, nevertheless, affirm

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[66] *Id.* at 196-197 (italics added).

[67] The Ohio Supreme Court, in *State v. Smith*, 58 Ohio St. 2d 344, _____ N.E. 2d _____ (1979), broadened its holding in *Roberts, supra*, to include the preclusion at trial of an unavailable witness' recorded preliminary hearing testimony "where the record shows that the witness was cross-examined only briefly and ineffectively" at the preliminary hearing. 58 Ohio St. 2d at 347.

the Ohio Supreme Court's decision and hold that the admission at the defendant's trial in this case of the witness' recorded preliminary hearing testimony, absent any cross-examination of the witness at the hearing, violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven M. Cox, a member of the bar of the Supreme Court of the United States and counsel of record for the Ohio Public Defenders Association, *amicus curiae* herein, hereby certify that on August ___, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the attached Motion For Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* on each of the parties herein, as follows:

On State of Ohio, petitioner herein, by depositing such copies in the United States Post Office, Columbus, Ohio, with first class postage prepaid, properly addressed to the post office address of John E. Shoop, the above-named petitioner's counsel of record, at Lake County Court House, Painesville, Ohio 44077.

On Herschel Roberts, respondent herein, by depositing such copies in the United States Post Office, Columbus, Ohio with first class postage prepaid, properly addressed to the post office address of Marvin R. Plasco, the above-named respondent's counsel of record, at Western Reserve Law Building, 7556 Mentor Avenue, Mentor, Ohio 44060.

On the Solicitor General of the United States, *amicus curiae* herein, by depositing such copies in the United States Post Office, Columbus, Ohio, with first class postage prepaid, properly addressed to the post office address of Wade McCree, the above-named *amicus curiae's* counsel of record, at the Department of Justice, Washington, D.C. 20530.

All parties required to be served have been served. Dated August ___, 1979.

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